

1618518 (Migration) [2017] AATA 3120 (5 September 2017)

DECISION RECORD

DIVISION: Migration & Refugee Division

CASE NUMBER: 1618518

MEMBER: Russell Matheson

DATE: 5 September 2017

PLACE OF DECISION: Sydney

DECISION: The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Statement made on 05 September 2017 at 11:25am

CATCHWORDS

Migration – Partner (Temporary) (Class UK) visa – Subclass 820 (Spouse) – Genuine and continuing relationship – Sponsor's financial contribution – Separate finances – Limited recognition from others – Live separately – Decision under review affirmed

LEGISLATION

Migration Act 1958, ss 5CB, 65, 359AA, 375A

Migration Regulations 1994, r 1.09A, Schedule 2 cls 820.211, 820.221

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 18 October 2016 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant is [age] year old national of Iran. He applied for the visa on 29 December 2014 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2)(a) because the delegate was not satisfied the applicant is the de facto partner of the sponsor.
4. The applicant appeared before the Tribunal on 28 August 2017 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor. The applicant seeks review of the delegate's decision.
5. The applicant was represented in relation to the review by his registered migration agent. The representative attended the Tribunal hearing.
6. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in the present case is whether the applicant is the de facto partner of the sponsor as defined in s.5CB of the Act.
8. The Tribunal has before it the Department's file relating to the applicant; its own file; and copy of the Department's decision provided by the applicant to the Tribunal.
9. **The hearing**
10. The Tribunal told the applicant certain information in the Department file is the subject of a 375A certificate. The certificate prevents the Tribunal disclosing any document, matter or information referred to in the certificate as it would be contrary to public interest. The Tribunal has considered the information that is subject to the certificate and is of the view, that as the information relates to departmental investigations and the information is classified as "sensitive", it is relevant to this review and the Tribunal places weight on the information under the certificate. The Tribunal considered the applicant's evidence and placed no weight on the information subject to the certificate.
11. The Tribunal informed the applicant that it would put to him information subject of the 375A certificate that it would consider to be the reason or part of the reason for affirming the decision. The Tribunal explained the relevance and the consequences of the information and invited the applicant to respond to the information. The applicant was informed that he could respond orally or in writing. He was informed that he may also seek additional time to

comment on or respond to the information. The applicant decided to respond orally to the information.

12. The Tribunal put to the applicant that information in the Department's file indicated that he had been prosecuted [for] misconduct.
13. The applicant gave a detailed account of being in a depressed state of mind and [having] a drug of addiction and the effects it had upon him in the workplace. The applicant informed the Tribunal that he had been prosecuted [in] March 2016 and had lost his job and his registration [had] been cancelled.
14. Additionally other information subject to the 375A certificate was put to the applicant in accordance with s.359AA. The Tribunal also put to the applicant that an anonymous dob in had been received by the [Department].
15. The applicant replied that [he] was baffled and had no idea who or why anyone would make such a complaint. He also said he found it strange and that he did not have any enemies.

Whether the parties are in a spouse or de facto relationship

16. Clause 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the de facto partner of the sponsor who is an Australian citizen.

Are the parties in a de facto relationship?

17. As the parties are not married to each other under a marriage that is valid for the purposes of the Act, they cannot satisfy an essential requirement of a spouse relationship, but may meet the criteria on the basis of being in a de facto relationship as defined in s.5CB of the Act. A person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).
18. In forming an opinion whether they are in a de facto relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.09A(3) which is attached to this decision.

19. Financial aspects

20. The Tribunal has considered the financial aspects of the relationship. The applicant told the Tribunal that he is currently unemployed and is studying full time. The applicant said that he is reliant on his mother who is living in Iran sending him eight hundred to a thousand dollars a month for his daily living expenses. He said that he uses the money for clothes, maintenance for his motor vehicle, fuel and magazine subscriptions. The sponsor stated that she pays all the daily living expenses and the applicant makes no financial contribution. The sponsor said she did not ask the applicant how much money he receives from his mother in Iran because she did not want to be intrusive. The parties said that they have their own separate bank accounts. The parties stated that the applicant used to give the sponsor cash for the daily living expenses when he was working. The parties have no joint liabilities or major assets and there is no evidence of pooling financial resources or sharing the daily living expenses.

21. Nature of the household

22. The Tribunal has considered the nature of the household. The applicant stated that he is studying full time and living at the sponsor's residence. The applicant said that the sponsor does the cleaning, washing and cooking most of the time. The sponsor said she was a traditionalist and a domestic goddess and that she does the housework. The parties stated that the applicant receives correspondence such as bank and superannuation statements and a [magazine] subscription mailed to the sponsor's address. The applicant produced no documentary evidence to the Tribunal showing this actually occurred. The applicant stated that his car is registered and insured in a friend's name at an address in Waitara. He stated that he had not paid for the car and that is why it is not registered to his current address. The parties stated that they had not purchased any household items together. There is limited evidence to show the couple has established a joint household together. The Tribunal is not satisfied the parties share the household duties and responsibilities.

23. Social aspects

24. The Tribunal has considered the social aspects of the relationship. The sponsor stated she and the applicant had no common friends and they like to keep to themselves. The sponsor said that her friends at work knew she was in a relationship with the applicant but they had not met the applicant. She further stated that she did not talk much about her relationship with the applicant at work because it was a gossipy environment. The parties told the Tribunal their families were aware that they were in a de facto relationship. The parties said that they go for drives down the coast, watch movies and visit the sponsor's family together. The applicant has provided three form 888 statutory declarations from the sponsor's brother and sister in law and a friend of the applicants. These declarations give little insight into the relationship or any convincing as to why they believe the relationship is a genuine and continuing relationship. The applicant has provided nine additional character references as evidence which only reflect on the applicant's character and not his relationship with the sponsor. The Tribunal places no weight on the declarations or character references. The applicant provided very little photographic evidence of their social activities together. There is one family photo and generally the other photographs are limited to photographs of the couple on their own. There is limited evidence and recognition from other people before the Tribunal showing that the parties represent themselves, other than to their immediate family, as being in a genuine and continuing de facto relationship. There is also limited evidence before the Tribunal that the parties plan and undertake social activities together.

25. Commitment

26. The parties allege that they entered into a committed relationship from October 2012. The parties registered their relationship in New South Wales [in] July 2014. The applicant stated that the parties moved in together in October 2014 and also stated in his original application that the parties entered into a committed relationship in October 2014. When questioned about his comments he said that the couple were in a committed relationship from their first date in October 2012. The Tribunal questioned the applicant as to why the couple registered their relationship in July 2014 and why he indicated that he was in a committed relationship when he moved into the sponsor's residence in October 2014. The applicant responded saying he was in a relationship from October 2012 with the sponsor to the exclusion of all others. There is little evidence before the Tribunal to indicate the parties were in a relationship between October 2012 and July 2014.
27. The parties told the Tribunal that they lived apart on a part time basis for fifteen months between August 2015 and November 2016 when the applicant was living at addresses in [two different suburbs]. The applicant said this period of separation was because of his work commitments and that it was too far to travel from the sponsor's house at [one place] to his

place of [work]. The sponsor told the Tribunal the applicant would spend two to three days at her house during this period of separation. The Tribunal has concerns that on the evidence given by the applicant that there is a lack of commitment to the relationship which undermines claims of the companionship and emotional support they draw from each other.

28. The parties spoke openly about the applicant and his addiction to a [drug] and his [prosecution]. The applicant stated that he has been supported by the sponsor during this turbulent time of his life. The sponsor told the Tribunal that she has stuck by the applicant during his ordeal and believed that their relationship was a long term one. The sponsor said the applicant always encouraged her with her writing and she wanted to become a full time author. She also said if the applicant was reinstated to [his work] they would like to build a business together. The applicant said that after what he had been through he was [details deleted]. The Tribunal accepts the parties provide each other with a degree of companionship and emotional support.
29. The applicant told the Tribunal that he has not made the sponsor the beneficiary of his will or superannuation. There is limited evidence before the Tribunal to indicate the parties view their relationship as a long term one.

30. Findings

31. The Tribunal found the 375A certificate attached to the Department file to be valid. The certificate prevents the Tribunal disclosing any document, matter or information referred to in the certificate as it would be contrary to public interest. The information in the certificate was classified "sensitive". The Tribunal is not satisfied that the information contained in folio's 93-94 is relevant to considering a partner visa and is of the view the information is more relevant to considering the applicant's skilled independent visa application. The Tribunal places no weight on the information contained in folios 93 and 94 of the Department file. The Tribunal has considered the information contained in the Department file subject of the 375A certificate in folio 74. The Tribunal places no weight on the anonymous complaint when considering the visa application. The Tribunal accepts the evidence of the applicant.
32. The Tribunal does not consider the financial, household, social or commitment aspects of the parties' relationship are strongly indicative or commensurate of a couple with a genuine and mutual commitment to a shared life together. There is no evidence of pooling of finances, or shared assets or shared financial obligations. There is a lack of evidence demonstrating any sharing of living expenses of what would usually occur in a shared household. There is a lack of evidence to support the parties established a joint household together. There is little evidence to support the parties represent themselves to family, friends and the broader community as being in a genuine and continuing de facto relationship. The Tribunal accepts the applicant and sponsor provide each other with a degree of companionship and emotional support. The Tribunal on the evidence presented is not satisfied that the parties are partners in a de facto relationship.
33. Overall, having considered all the circumstances of the relationship, the Tribunal finds the weight of evidence does not support a finding the parties are in a genuine and continuing relationship.
34. The Tribunal is not satisfied the couple have a mutual commitment to a shared life to the exclusion of all others, or that they are in a genuine and continuing relationship and they live together and do not live separately and apart on a permanent basis.
35. On the basis of the above the Tribunal is not satisfied that the requirements of s.5CB(2) are met at the time of application and therefore cl.820.211(2)(a) is not met.

36. Given these findings the Tribunal is not satisfied at the time the visa application was made and at the time of this decision the parties were in a de facto relationship. There is no information before the Tribunal that the applicant would satisfy any of the alternate criteria for the grant of the visa. There is no evidence, and the applicant does not claim, that he has suffered family violence, the sponsor is alive and there are no children and no responsibilities in relation to children.
37. Therefore the Tribunal is satisfied the applicant does not meet cl.820.211(2)(a) and cl.820.221.
38. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

39. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Russell Matheson
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.09A De facto partner and de facto relationship

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits *the* regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).